

Supreme Court, U.S.
FILED

No. 051072 FEB 17 2006

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OTIS DALE TUNE

Petitioner

v.

LISA RUTH GREEN

Respondent

On Petition For Writ Of Certiorari
To The Supreme Court of the State of Oklahoma

PETITION FOR WRIT OF CERTIORARI

BILL V. WILKINSON
Counsel of Record

WILKINSON LAW FIRM
7625 E. 51st St., STE 400
TULSA, OK 74145-7857
918-663-2252

QUESTIONS PRESENTED FOR REVIEW

This civil case was tried to a jury. The Plaintiff's case depended on circumstantial evidence, but the Trial Court refused to instruct the jury on circumstantial evidence. The question presented for review is whether the Plaintiff's due process rights under the Fourteenth Amendment were violated by the refusal of the Trial Court to instruct the jury on circumstantial evidence?

PARTIES TO PROCEEDING

All parties to this proceeding are listed on the cover page. The attorney for the Petitioner is listed on the cover. The attorney for the Respondent is:

Robert H. Taylor, Esq.
KING, TAYLOR & RYAN
850 Boulder Towers
1437 South Boulder Avenue
Tulsa, Oklahoma 74119-3640

TABLE OF CONTENTS

Questions Presented for Review	i
Parties to Proceeding	ii
Table of Contents	iii
Table of Authorities	iv
Petition for Writ of Certiorari	1
APPENDIX	A-1
Petition for certiorari is denied.	A-1
The petition for rehearing of appellant/plaintiff Otis Dale Tune is DENIED.	A-3
AFFIRMED	A-4
OPINION BY JANE P. WISEMAN, JUDGE ...	A-5
JOURNAL ENTRY OF JUDGMENT	A-13

TABLE OF AUTHORITIES

CASES

Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) 4, 5

Pacific Insurance Company of New York v. Frank, 452 P.2d
794 (Okl. 1969) 2-5

Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500 (1957)
. 4

List of forty-nine states' highest court cases which validate
circumstantial evidence in a civil proceeding. 6

RULES

Rule 10(b) and 10(c), Rules of the Supreme Court of the United
States 1

OTHER AUTHORITIES

4 L. Sand, J. Siffert, W. Loughlin, S. Reiss, & N. Batterman,
Modern Federal Jury Instructions (2002) (Model Instruction
74-2) 8

Fourteenth Amendment to the United States Constitution,
Section 1 1, 4, 6

PETITION FOR WRIT OF CERTIORARI

The basis for jurisdiction in this Court is Rule 10(b) and 10(c), Rules of the Supreme Court of the United States.

The Oklahoma Supreme Court's denial of Petitioner's Petition for Certiorari was filed on November 21, 2005, regarding the Oklahoma Court of Civil Appeals' Decision filed on July 12, 2005, which affirmed the Trial Court's Judgment filed on November 21, 2003. A Petition for Rehearing before the Oklahoma Court of Civil Appeals was denied on August 26, 2005.

The constitutional provision involved in this case is:

Fourteenth Amendment to the United States Constitution.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The facts of this case present a classic example of the importance of circumstantial evidence in our jurisprudence. This civil case arises from an automobile accident which occurred at an intersection controlled by traffic control lights in the City of Tulsa, Oklahoma. The Plaintiff contends the Defendant ran the red light and caused the accident resulting in serious injuries and property damage. But there is no direct

evidence to support this contention because no witness saw the color of the light when Defendant entered the intersection. The circumstantial evidence, however, is compelling. The traffic control lights at the intersection are all controlled by an electronic device located at the intersection. Two witnesses called to testify by the Plaintiff explained that a loop sensor device is embedded in the concrete in the left-turn lane where the Plaintiff is stopped waiting to turn. Because of a timing device, the left-turn arrow does not turn green until the traffic control device for oncoming traffic has already turned red. The time sequence is precisely controlled by the electronic control device. The Plaintiff testified he waited to turn until the left-turn arrow turned green and no other cars were than in the intersection. After Plaintiff turned, the Defendant's car struck him in the intersection. This circumstantial evidence proves that when the Defendant's car entered the intersection, the traffic light was red.

The Plaintiff requested the Trial Court to instruct the jury on circumstantial evidence, but the Trial Court refused to do so. The defense relied heavily on the absence of any direct evidence of the color of the traffic light controlling the Defendant's automobile, and the defense attorney argued in his closing argument, "*Apparently, the only person who saw the red light is Bill Wilkinson.*" The argument refers to and identifies Plaintiff's counsel. Predictably, the jury determined that, in the absence of any direct evidence regarding the color of the traffic light controlling the direction of the traffic in which the Defendant was proceeding, a verdict unfavorable to the Plaintiff was necessary.

The refusal of the Trial Court to instruct the jury on circumstantial evidence is a paradox because the Oklahoma appellate courts have consistently recognized the importance of circumstantial evidence. A clear example is *Pacific Insurance*

Company of New York v. Frank, 452 P.2d 794 (Okla. 1969), in which the Oklahoma Supreme Court reversed the trial court for failing to instruct the jury on circumstantial evidence. In reversing the trial court, the Court held:

The jury neither was advised, nor had means of knowing, this defense was provable by circumstantial evidence which properly should be considered, or that a preponderance of evidence could be established by circumstantial evidence and the reasonable inferences deducible therefrom.

[452 P.2d 794, 797]

In spite of this history, however, a note appears in the Uniform Jury Instructions for Oklahoma which indicates that the instruction for circumstantial evidence should not be given in a civil case. The reason for the note is unclear and no appellate court decision in Oklahoma has held that a circumstantial evidence instruction should not be given to the jury in a civil case. The note is referred to in the Court of Civil Appeals Decision in this case, but no further discussion, explanation, or consideration of the important legal principle is found in the Decision. (See Appendix, COCA Opinion, p. A-9). The Court of Civil Appeals ignores the core legal principle of the importance of instructing the jury on circumstantial evidence in this case as was discussed in *Pacific Insurance Company, supra*.¹ Thereafter, Petitioner sought further review by the

¹ The decision by the Court of Civil Appeals sidesteps the central issue by reasoning that the parties "... testified as to what their traffic signal indicated." (Appendix, p. A-9) In fact, the testimony was in regard to the color of the lights **before** the accident. The Appellate Court further explains that there was evidence regarding the timing

Oklahoma Supreme Court, but that Court declined to consider the appeal on November 21, 2005.

Certiorari should be granted because circumstantial evidence is as important as direct evidence and may be considered by the jury in a civil case. *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957). Petitioner urges that his due process rights under the Fourteenth Amendment were violated because the jury was not instructed on circumstantial evidence. Oklahoma cannot and should not arbitrarily deny Petitioner's equal protection of the laws under the Fourteenth Amendment. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). In *Desert Palace*, this Court analyzes and explains the importance of circumstantial evidence in a civil case. Even though the appeal in *Desert Palace* involves a Title VII case, the reasoning is helpful in this case. This is especially true since this Court's analysis includes an overview of the "***conventional rule of civil litigation***" with regard to circumstantial evidence. 539 U.S. 90, 99. As part of this discussion, the Supreme Court reaffirms this conventional rule as follows:

***That rule requires a plaintiff to prove his case
"by a preponderance of the evidence,"* *ibid.*
using "direct or circumstantial evidence,"
Postal Service Bd. of Governors v. Aikens 460
U.S. 711, 714, n. 3, 75 L.Ed. 2d 403, 103 S. Ct.
1478 (1983). [539 U.S. 90, 99]**

sequence of the lights. But this analysis ignores the crucial point that such evidence regarding timing of the sequences is circumstantial evidence and, as noted in *Pacific Insurance Company, supra*, the jury in this case had no means of knowing what circumstantial evidence is or that the Plaintiff could prove his case through such circumstantial evidence.

And in specifically addressing the issue of circumstantial evidence, the decision further explains:

The reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 508, n. 17, 1 L. Ed. 2d 493, 77 S. Ct. 443 (1957).
[539 U.S. 90, 100]

It is clear from the reasoning by this Court in *Desert Palace* that the legal principles regarding circumstantial evidence are deep-rooted. Indeed, they are fundamental to our system of justice. And, as recognized by the Oklahoma Supreme Court in *Pacific Insurance Company, supra*, the jury instruction for circumstantial evidence is especially important because the jury has no way of knowing or understanding that the ***" . . . preponderance of evidence could be established by circumstantial evidence and the reasonable inferences deducible therefrom."*** The practical impact of this subtle but powerful point is apparent in this case. It is impossible for the Petitioner to meet his burden of proof in this case without circumstantial evidence. The central issue, of course, is whether the traffic light was red for the Defendant when she entered the intersection. There was no direct evidence of this fact because neither party nor any witness saw the color of the light at the moment the Defendant entered the intersection. Thus, Petitioner had to prove the preponderance of evidence by circumstantial evidence. But it cannot be presumed that the jury knows what circumstantial evidence is or that Petitioner is legally permitted to rely on circumstantial evidence to meet his burden of proof. And this point is demonstrated by the closing

argument of the defense attorney in arguing that there was no direct evidence the light was red. Petitioner's due process rights under the Fourteenth Amendment were violated because the Trial Court refused to instruct the jury on circumstantial evidence even though the Trial Court was timely requested to do so. The refusal to instruct the jury on circumstantial evidence is repugnant to the due process clause of the Fourteenth Amendment and this Court should grant the Petition for Writ of Certiorari.

Oklahoma stands alone with regard to the refusal to recognize and instruct on circumstantial evidence. Every other state court and federal court recognizes the deep-rooted principle of circumstantial evidence and routinely instructs juries in civil cases on circumstantial evidence in order that jurors will understand what circumstantial evidence is and in order that juries will understand that the parties may meet the burden of proof by circumstantial evidence.

List of forty-nine states' highest court cases which validate circumstantial evidence in a civil proceeding:

Alabama	<i>Edison v. Olin Corp.</i> 527 So.2d 1283 HN 6
Alaska	<i>Alderman v. Iditaord Properties</i> 32 P.3d 373 <i>Gabaig v. Gabaig</i> 717 P.2d 835
Arizona	<i>Ackerman v. Boyd</i> , 74 Ariz. 81 HN 3
Arkansas	<i>Childs v. Adams</i> , 322 Ark. 424 HN5
California	<i>Palmquist v. Mercer</i> , 43 Cal.2d 92 CA 10 (California Official Reports Headnotes)
Colorado	<i>French v. Patriotic Ins. Co.</i> , 107 Colo. 275 HN2
Connecticut	<i>Gleba v. New Britain</i> , 133 Conn. 85 HN1
Delaware	<i>Director General of Railroads v. Johnston</i> 31 Del 397
Florida	<i>Wright v. Blocker</i> , 144 FLA 428 p. 434

Georgia	<i>Johnson v. Green</i> , 251 Ga. 645
Hawaii	<i>American Broadcasting Cos. v. Kenai Air</i> , 67 Haw 219 HN4
Idaho	<i>Wilkins v. Wilkins (In re Estate of Wilkins)</i> , 37 Idaho 315
Illinois	<i>Creighton v. Elgin</i> , 395 Ill. 87 page 96
Indiana	<i>Davis v. Babb</i> , 190 Ind. 173 HN 3
Iowa	<i>Becker v. Fleener</i> , 376 NW 2d 594 , 597 , <i>Harsha v. State Sav. Bank</i> , 346 NW 2d 791, 800
Kansas	<i>Reznik v. McKee</i> , 216 Kan 659 HN2
Kentucky	<i>Ky. Kingdom Amusement Co. v. Belo Ky.</i> , 179 S.W. 3d 785 HN8
Louisiana	<i>Hall v. Arkansas-Louisiana Gas Co.</i> , 368 So. 2d 984 HN 5
Maine	<i>James v. MacDonald</i> , 1998 ME 148, 712 A.2d 1054 HN4
Maryland	<i>Slack v. Truitt</i> , 368 MD 2 HN 9
Massachusetts	<i>Johnson v. Gerald</i> , 169 Mass. 500 p, 503
Michigan	<i>Wadsworth v. New York Life Ins. Co.</i> , 349 Mich. 240 HN2
Minnesota	<i>Balafas v. Balafas</i> , 263 Minn 267 HN1
Mississippi	<i>Lititz Mut. Ins. Co. v. Boatner</i> , 254 So. 2d 765 HN1
Missouri	<i>Louis v. Andrea</i> , 338 SW 2d 96 HN4
Montana	<i>Rix v. General Motors Corp.</i> , 222 Mont. 318 HN18
Nebraska	<i>Tilt-Up Concrete v. Star City-Federal</i> , 255 Neb. 138 HN3
Nevada	<i>Longly v. Heers Bros.</i> , 86 Nev. 599 HN 1
New Hampshire	<i>O'Brien v. Donohoe</i> , 86 NH 372
New Jersey	<i>Eaton v. Eaton</i> , 119 NJ 628 HN3
New Mexico	<i>Trower v. Board of County Comm'rs</i> , 75 NM 125 HN 1